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IN THE

Supreme Court of the United States

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JUN 16 1965
JOHN F. DAVIS, CLERK

October Term, 1964

No. 261

BERNARR FRANK HAYDEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Comes now Bernarr Frank Hayden and petitions this honorable court for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit and prays that A Writ of Certiorari issues to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case. Decision rendered on March 29, 1965. Petition for a rehearing denied on May 10, 1965.

Opinions.

The opinions below are attached hereto in Appendix A.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1254 United States Code and by the Fourth and Fifth

Amendment to the Constitution of the United States. The Writ is presented in conformity with Rule 23, Rule for Supreme Court of the United States.

Constitutional Provisions and Statutes Involved.

The constitutional provisions and statutes involved are set forth in Appendix B hereto are: The Fourth and Fifth Amendments to the Constitution of the United States.

Statement of the Case.

Appellant was charged in the Indictment [No. 3367-CD] with having prior to May 23, 1963 and continuing to on or about June 30, 1963, devised and intended to devise a scheme and artifice to defraud Bradmore Investment Company Ltd., a company engaged in the business of factoring (advancing money) on accounts receivable and to obtain money and property by means of false and fraudulent pretenses, representations and promises were false when made.

On October 17, 1962 Defendant entered into a contract with Bradmore Investment Co. to purchase accounts receivable from Optronic's, a company owned by defendant [R.T. 53]. This case involves the alleged fraudulent sale of accounts by Defendant and his Company to Bradmore Co. during the period of March through May 31, 1963. [R.T. 11, 47, 49, 75].

Defendant received certain sums of monies from Bradmore Co. on a representation made in person by the Defendant to Bradmore that he had received a valid purchase order from Hughes Aircraft Optical Division, 8640 West 3rd St., Los Angeles, California. Bradmore agreed to purchase this account and monies

were given on three separate invoices and bill of sale. The invoices at no time mentioned Hughes Aircraft Co., Culver City, California.

A condition of the agreement between Defendant and Bradmore was that in the event of a rejection notice from the customer, Defendant would be responsible to Bradmore for the loss.

On May 31, 1963 Defendant presented the fourth and last invoice to Bardmore which they refused to purchase [R.T. 20, 34, 142].

Defendant has stated that an employee from Hughes Aircraft Optical Division of 8640 W. 3rd Street had picked up the three previous orders directly at his shop. Later Defendant found this address to be an answering service and had been a victim of a fraud.

Defendant later stated to Bardmore's attorney that he found out that Hughes Aircraft Co. he did business with was not the Hughes of Culver City, but a company in Great Falls, Montana. Defendant stated that he had taken the order based upon a Mr. Berkson's representation that he was a purchasing agent for Hughes Aircraft of Culver City. [R.T. 61, 68, 105, 107].

Defendant went to Great Falls, Montana and later called Bradmore and told them that the Hughes Co. had rejected the three previous orders, and they couldn't wait for the parts to be reworked. [R.T. 113].

This cause came before the Court on May 18, 1964. Order on Defendant's Motion for Bill of Particulars and Motion to Dismiss the Indictment were both denied. After trial by jury defendant was found guilty on all four counts. On July 13, 1964, judgment and sen-

tence were pronounced. Defendant was sentenced to two years on each count to run concurrently. A Notice of Appeal was timely filed on July 20, 1964.

Questions Presented.

The District Court was without jurisdiction to try this action and abused its discretion in not dismissing the Indictment for lack of a cause of action.

Reasons Why Writ Should Be Granted.

Defendant in causing the rejection parts and order to be sent back from Montana to Bradmore Co. was not for the purpose of obtaining any other monies but to assume the responsibility a provision of the agreement between Defendant and Bradmore.

The use of the mails or wire were not used in furtherance of a crime but devised in good faith. Bradmore and Defendant had transacted other business in good faith.

The good faith is shown wien Bradmore accepted the accounts and never ran a check on this company but relied on the past showing of good faith. In view of these circumstances it must be brought into focus whether or not the defendant's rights protected by the Fourth and Fifth Amendment of the Constitution of the United States may not also have been violated. There is no showing that defendant caused to be sold bill of sales with knowledge of lack of value therein.

The bad faith cannot be inferred from the character of the representation made. Belief in truth of statements is a good defense, however inaccurate the statement may turn out.

Harrison v. United States (Ohio 1912), 200 Fed. 622, 669, 670.

In the leading case of the statute which is derived from the old Criminal Code *Kann v. United States,* 323 U.S. 88, held that when a scheme has reached fruition without use of the mails, it cannot be said that mailings thereafter which are made are for the purpose of executing the original scheme, as the statute requires.

In *Parr v. United States,* 363 U.S. 370 the same doctrine that unless the mailings in question were for the specific purpose of executing a scheme to defraud, where the scheme has already reached fruition, then the statute has not been violated. The Court at this time was interpreting Title 18, U.S.C., Section 1341.

United States v. Sampson, 371 U.S. 65. The District Court dismissed the indictment on the ground that since the money had alread been obtained before the acceptances were mailed, these mailings could not have been within the meaning of Section 1341, Title 18, U.S.C. This judgment was appealed by the Government. The judgment of the District Court was reversed on the doctrine that the use of mail after the money was obtained from the victim was for the purpose of lulling the victim by assurances that promised services would be performed.

The indictment is distinguishable from the present indictment from which Appellant suffers in that instead of lulling by the alleged conduct of the Appellant in his use of the mails and telephonic communication, they were only used for the specific purpose of alerting the victim of a rejection of the original order which had been factored by Bradmore Investment Co., Ltd., for the Appellant so that the liability for the factored invoices would be returned to Appellant. There was no lulling or expose of fraud that occurred before any

use of the mails or telephonic communications were ever made. The factor of lulling, which was relied on by the *United States* in the *Sampson* case is absent in this case under all four counts. The lull of particulars readily admits that all communications were made *after* all the money had been received by Appellant.

The fundamental rule laid down in the *Kann* and *Parr* cases is applicable and the indictment does not come under the exception set forth in the *Sampson* case.

The District Court is without jurisdiction under these cases to go forward with the trial of this case, and such Court did abuse its discretion in not dismissing the indictment for lack of a cause of action.

Conclusion.

For the reasons set forth above we pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

AL MATTHEWS,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Bernart Frank Hayden, Appellant, vs. United States of America, Appellee. No. 19,488.

[March 29, 1965]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Chambers, Barnes and Merrill, Circuit Judges Per Curiam:

Appellant appeals from his conviction on four counts, two charging mail fraud (18 U.S.C. § 1341) and two charging wire fraud (18 U.S.C. § 1343). Appellant was sentenced to two years on each count, to run concurrently.

Jurisdiction existed below pursuant to 18 U.S.C. § 3231, and here pursuant to 28 U.S.C. § 1291.

We hold there is no merit in the appeal. The sole error alleged is the failure of the district court to dismiss the indictment for lack of jurisdiction, based on the theory that the means (telegram, telephone and mail) were used in June 1963, while the money was delivered in May 1963. The superseding indictment charged the scheme to defraud began May 23, 1963 and continued to June 30th, 1963.

Thus, urges appellant, the means used were not for the purpose of executing a scheme to defraud, relying on *Kann v. United States,* 323 U.S. 88 (1944) and *Parr v. United States,* 363 U.S. 370 (1959), nor for

"lulling" the victim. *United States v. Sampson,* 371 U.S. 65 (1962).

The government's answer is that the calls and wires occurred before the scheme to defraud had been *completed.* After having received sums of money on false invoices on May 23, 1963, May 27, 1963 and May 29, 1963, appellant sought to obtain further funds on false invoices (Exhibits 4 and 11) on May 31st, 1963, *et seq.*

The *Kann* case, *supra,* relied on by appellant, by its own language is inapplicable to the case at bar. It distinguishes those "cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated." (*Id.* at 94-95.) It cites *United States v. Riedel,* 126 F. 2d 81 (7th Cir. 1942); *Dunham v. United States,* 125. F.2d 895 (5th Cir. 1942); *United States v. Lowe,* 115 F. 2d 596 (7th Cir. 1940). See also the dissenting opinion arguments of Justices Douglas, Black, Jackson and Rutledge in *Kann, supra.*

In this type of case, "it is not necessary to allege that the scheme was successful, or that the loss was incurred as a result of its operation." (*United States v. Lowe, supra,* at 597.) The use of the mails was an essential step in the scheme to defraud, and a "continuing" one. *Decker v. United States,* 140 F. 2d 378, 379 (1944).

Of course, if the acts subsequent to the payment of the money fraudulently obtained are to lull the defendants into inaction, or forestall action, the *Kann* rule does not apply. *United States v. Sampson,* 371 U.S. 75 (1962). This factual issue it is unnecessary to reach.

Affirmed.

APPENDIX B.

Fourth Amendment to the Constitution of the United States.

The right of the people to be secure in their persons Houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life—liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, Section 1341.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to

be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, Section 1343.

§ *1343. Fraud by wire, radio, or television*

Whoever, having devised or intended to device any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 261

BERNARR FRANK HAYDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 343 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1965 (Pet. 1). A petition for rehearing was denied on May 10, 1965. On June 9, 1965, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1965, and a petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

781-173—65

QUESTION PRESENTED

Whether the evidence showed the use of the United States mails and of interstate wire communications in furtherance of a scheme to defraud.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on two counts of using the mails to execute a fraud and two counts of using interstate communication wires to execute a fraud in violation of 18 U.S.C. 1341 and 18 U.S.C. 1343. He was sentenced to two years' imprisonment on each count, to be served concurrently. The court of appeals affirmed *per curiam*.

The evidence reveals that petitioner, a manufacturer of optic supplies, entered into a contract to sell his accounts receivable to Bradmore Investment Company, a factor (Tr. 53). In March and April 1963, petitioner told Bradmore that he was expecting a substantial order from Hughes Aircraft of Culver City (a well known firm in California) (Tr. 55). Bradmore indicated that it would purchase all of the accounts receivable charged to Hughes that petitioner could bring in (Tr. 55).

On May 22, 1963, petitioner registered at a local motel under a fictitious name, listing his employment as purchasing agent for Hughes Aircraft (Tr. 23, 196–200; Ex. 25, 38, 39). On May 23, 1963, he presented to Bradmore an invoice and shipping order made out to Hughes Aircraft, Optics Division, at a Los Angeles address (Tr. 15, 16, 79; Ex. 1). Brad-

more purchased the invoice for $5,359 (Tr. 20–22). On the same day, petitioner subscribed to an answering service in Los Angeles located at the address shown on the invoice sold to Bradmore as being that of Hughes Aircraft (Tr. 186–187).

Petitioner sold Bradmore two more fictitious invoices on May 27, 1963 ($10,472) (Tr. 17, 18, 79; Ex. 2), and May 29, 1963 ($9,979.20) (Tr. 18, 19, 79; Ex. 3). Petitioner offered a fourth invoice on May 31, 1963, but Bradmore did not accept it (Tr. 19, 20, 79; Ex. 4). On June 3, 1963, Bradmore sent a wire to Hughes Aircraft, Optics Division, at the Los Angeles address shown on the first invoice presented by petitioner (Tr. 26–29). This wire was received by petitioner's answering service and passed on to him (Tr. 190; Ex. 18, 37). Petitioner replied in a wire signed "Hughes Aircraft Company," stating that the Los Angeles office was on vacation and was being transferred to Great Falls, Montana (Tr. 28, 29; Ex. 9, 18). Petitioner had previously subscribed to an answering service in Great Falls in the name of Hughes Aircraft Company (Tr. 211–214, 258, 267; Ex. 40, 41, 42).

Shortly after Bradmore received petitioner's wire, petitioner went to its offices to inquire why it had rejected the invoice presented on May 31, 1963. Bradmore personnel expressed doubts as to the existence of the Hughes Aircraft Company shown on the invoices. Petitioner insisted that the company was in existence and showed them a fictitious purchase order from Hughes Aircraft for $50,000, which he

requested Bradmore to purchase (Tr. 35–37, 40–41, 58–59, 145; Ex. 11).

Petitioner then sent one of his employees to Montana with a package of 5,000 defective slides, which the employee, following petitioner's instructions, repackaged and shipped back to petitioner. This same employee ordered rejection slips printed under the letterhead of Hughes Aircraft and mailed a copy of the rejection slips,[1] covering all the invoices mentioned above, to petitioner and Bradmore on June 10 (Tr. 38, 39, 60; Ex. 12). These mailings formed the basis of counts one and two.

On June 20, 1963, petitioner admitted to Bradmore that Hughes Aircraft was not the same company as Hughes Aircraft of Culver City (Tr. 60), but assured Bradmore that Hughes Aircraft in Montana was a bona fide company which would honor its orders (Tr. 66–68, 108). Petitioner said that the first shipment of slides had been rejected for not meeting specifications, but that petitioner could rework them and thus make the entire invoice collectible (Tr. 66–68, 108).

On June 27, 1963, petitioner flew to Montana with his employee and placed two long distance calls to California during which he told Bradmore that Hughes would not wait for petitioner to rework the rejected slides. On petitioner's instructions, his employee posed as a Hughes purchasing agent and repeated the same story on the telephone (Tr. 68–72, 99–102).

[1] Petitioner sold his accounts receivable without recourse. However, the factoring contract called for petitioner's payment in the event of rejects.

These telephone calls are the basis of counts three and four.

ARGUMENT

Contrary to petitioner's argument, his use of the mails and of interstate wire was part of a scheme to defraud that was still being perpetrated at the time of their use. At least through June 20, petitioner was still attempting to obtain funds from Bradmore by representing that he had an order from Hughes Aircraft in Montana. The mailing of the rejection slips on June 10 was designed to give the impression that slides had actually been manufactured pursuant to the order from Hughes and that the order was in the process of being filled. The mailing was thus an integral part of an unfulfilled scheme. This case is thus different from *Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, where the mailings were held to have occurred after the scheme to defraud had ended and to have been immaterial to its execution. The fact that petitioner did not succeed in his final attempt to obtain funds does not detract from the significance of the mailings to the plan. See *Kreuter* v. *United States,* 218 F. 2d 532 (C.A. 5); *United States* v. *Feldman,* 136 F. 2d 394 (C.A. 2), affirmed, 322 U.S. 487; *Norman* v. *United States,* 100 F. 2d 905 (C.A. 6), certiorari denied, 306 U.S. 660.

It is arguable that, by the time of the telephone calls of June 27, petitioner had given up any hope of getting any more money from Bradmore and was merely trying to keep Bradmore convinced that the

initial order was valid. However, as this Court stated in *United States* v. *Sampson*, 371 U.S. 75, 80, the mere fact that mailings took place after the victim had given up his funds does not mean that they were not for the purpose of executing a scheme to defraud. Such communications deliberately planned as a means of concealing the fraud or lulling the victims are within the purview of the fraud statutes. In any event, the mailing counts alone are sufficient to support the sentence. *Lawn* v. *United States*, 355 U.S. 339, 359.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965